Supreme Court, U.S.
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In The
Supreme Court of the United States

JAMES R. COOK,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1801

JAMES R. COOK, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before STEINBERG, *Judge.*

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

STEINBERG, *Judge:* The appellant, veteran James R. Cook, appeals through counsel a June 26, 1998, decision of the Board of Veterans' Appeals (BVA or Board) that determined that a June 1952 decision of a Department of Veterans Affairs (VA) regional office (RO) denying VA service connection for nervousness and a duodenal ulcer did not contain clear and unmistakable error (CUE). Record (R.) at 4. In April 1999, the appellant filed a brief and in response the Secretary filed a September 1999 motion for single-judge affirmance. Following the submission of additional pleadings by the parties in October and November 1999, the Court in March 2000 denied the Secretary's motion, granted a motion by the appellant to file out-of-time an October 1999 reply to the Secretary's motion and to raise new argument therein, and ordered the Secretary to file a surresponse brief as to the appellant's October 1999 reply. The Secretary filed such a brief in April 2000. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a).

Single-judge disposition is appropriate here because the case is one whose outcome is controlled by the Court's precedents and is "not reasonably debatable". *Frankel v. Derwinski,* 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the BVA decision.

I. Relevant Background

The facts of this case are set forth in detail in the opinion of this Court in *Cook v. Brown,* 4 Vet.App. 231 (1993); this decision will briefly summarize the facts pertinent to the instant appeal. The veteran had active service in the U.S. Army from August 1942 to December 1945. R. at 15. His service medical records (SMRs) contained a March 1945 diagnosis of "psychoneurosis, anxiety type". R. at 45-46. A September 1950 examination that was made upon his being recalled for service and that was part of the record on appeal (ROA) in *Cook, supra,* but that does not appear to be contained in the record as to the instant appeal, apparently "found [the veteran] not qualified for active duty due to his ulcer". *Cook,* 4 Vet.App. at 233.

In April 1952, he submitted to a VARO a claim for service connection for a nervous stomach. R. at 60-63. At a June 1952 VA examination he was diagnosed as having a duodenal ulcer. R. at 77. At a concurrent neuropsychiatric examination, the examiner noted:

> The present day idea is, generally, that a peptic ulcer may be a visceral expression of long continued anxiety. In this case, a diagnosis of duodenal ulcer has been established. A dual diagnosis should not be made, but it should be clear that the diagnosis of duodenal ulcer includes a psychic or emotional component.

R. at 78. In June 1952, the RO denied service connection for "stomach trouble and nervousness"; the RO indicated that the ulcer was not incurred or aggravated in service and that nervousness had not been found on the most recent examination. R. at 82. The RO also stated that the "[neuropsychiatric] examination revealed no evidence of a psychiatric disability." *Ibid.* The veteran did not appeal that decision to the BVA.

In June 1991, the BVA reopened the veteran's previously disallowed claims but denied service connection therefor (R. at 119-28), and in February 1993 this Court, based on new and material evidence submitted since the June 1952 RO denial, reversed the BVA and ordered the award of service connection for both claimed conditions, *Cook,* 4 Vet.App. at 237-38. Thereafter, the RO awarded service connection and assigned a 30% rating for the veteran's service-connected generalized anxiety disorder and a 0% rating for his service-connected duodenal ulcer disease, both effective as of July 1989. R. at 151. The veteran filed a December 1993 statement in support of claim that said: "I feel the award should be effective April 1952." R. at 154. In July 1994, the RO apparently construed the veteran's statement as a Notice of Disagreement as to the effective date and also as comprising a CUE claim, and determined that the April 1952 RO decision had not contained CUE. *See* R. at 170-71. In the June 26, 1998, BVA decision here on appeal, the Board determined that the April 1952 RO decision had not contained CUE. R. at 4.

II. Analysis

The appellant in his brief asserts that the Board's decision that the April 1952 RO decision did not contain CUE is arbitrary and capricious (Brief at 5-7), and in his October 1999 reply, he asserts that the June 1952 RO decision did not become final based on the opinion of the U.S. Court of Appeals for the Federal Circuit in *Hayre v. West,* 188 F.3d 1327 (Fed.Cir.1999). The Court will address each of these arguments in turn.

A. CUE

An RO decision that has become final, as has the June 1952 RO decision at issue here, generally may not be reversed or amended in the absence of CUE. *See* 38 U.S.C. § 5109A (codifying into law VA regulation 38 C.F.R. § 3.105(a), *infra*); 38 C.F.R. § 3.105(a) (1999); *see also* 38 U.S.C. §§ 5108, 7105(c). Section 3.105(a) of title 38, Code of Federal Regulations, provides:

> Where evidence establishes [CUE], the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of [CUE] has the same effect as if the corrected decision had been made on the date of the reversed decision.

38 C.F.R. § 3.105(a). The CUE claim presented here is a collateral attack on a final RO decision. *See Crippen v. Brown,* 9 Vet.App. 412, 418 (1996); *see also Fugo v. Brown,* 6 Vet.App. 40, 44 (1993).

In *Russell v. Principi,* the Court defined CUE as follows:

> Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied . . . . [CUE is] the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made.

Russell, 3 Vet.App. 310, 313-14 (1992) (en banc); *see also Bustos v. West,* 179 F.3d 1378, 1380 (Fed.Cir.1999) (expressly adopting the "manifestly changed the outcome" language in *Russell, supra*), *cert. denied,* 120 S.Ct. 405 (1999). "A determination that there was a '[CUE]' must be based on the record and the law that existed at the time of the prior . . . decision." *Russell,* 3 Vet.App. at 314. "[T]o raise CUE there must be some degree of specificity as to what the alleged error is and . . . persuasive reasons must be given as to why the result would have been *manifestly* different". *Fugo,* 6 Vet.App. at 44; *see also Crippen,* 9 Vet.App. at 420.

Russell also established that, as a threshold matter, a CUE claim cannot be raised for the first time before this Court but that the claim must have been the subject of a final prior BVA adjudication. *Russell,* 3 Vet.App. at 314-15. On appeal of a BVA determination that there was no CUE in a prior final RO decision, the Court's review is limited to determining whether the Board's conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (38 U.S.C. § 7261(a)(3)(A)) and whether it is supported by an adequate statement of "reasons or bases" (38 U.S.C. § 7104(d)(1)). *See Eddy v.*

Brown, 9 Vet.App. 52, 57 (1996); *Damrel v. Brown,* 6 Vet.App. 242, 246 (1994); *Russell,* 3 Vet.App. at 315.

The appellant alleges that the BVA determined "that there was not [sic] diagnosis of anxiety disorder in service", and asserts that that finding was "clearly erroneous". Reply at 8-9. However, the appellant has not provided a citation describing where the Board made such a factual determination, and the Court cannot find such a determination in the BVA decision on appeal. Moreover, the June 1952 RO decision being assailed for CUE had specifically recognized that the veteran's SMRs showed "treat[ment] on Mar[ch] 20 to 24, 1945[,] for exhaustion with a diagnosis of psychoneurosis, anxiety type." R. at 82. The RO had denied service connection for a nervous condition because it did not find that such a condition was "found on last examination". *Ibid.* Hence, even assuming that the Board did find as a matter of fact that there was no evidence of an in-service diagnosis of an anxiety disorder, the appellant has not provided any reason why that finding would support his challenge to the Board's determination that the June 1952 RO decision had not contained CUE. Thus, the appellant has not provided adequate "specificity as to what the alleged error is and . . . persuasive reasons . . . as to why the result would have been *manifestly* different" had any such error not been made. *Fugo, supra; see also Bustos* and *Crippen,* both *supra; Russell,* 3 Vet.App. at 313-14.

The appellant's second CUE argument is, in essence, that the RO's conclusion that the June 1952 "[neuropsychiatric] examination revealed no evidence of a psychiatric disability" (R. at 82) had denied the existence of evidence in support of his claim. *See Russell,* 3 Vet.App. at 319 ("the RO undebatably committed error . . . in making a

misstatement of fact about the evidence . . . [by] denying the existence of evidence that did indeed exist and was a part of the claims file"); *see also Mason (Sangernetta) v. Brown,* 8 Vet.App. 44, 52-53 (1995) (holding that RO committed error by "denying the existence of" evidence). The Court notes that the June 1952 VA neuropsychiatric examination report indicated that "it should be clear that the diagnosis of duodenal ulcer ***includes a psychic or emotional component***" (R. at 78) (emphasis added), which could support an inference of error as to the RO's conclusion that the examination had not revealed any "evidence of a psychiatric disability" (R. at 82).

However, the RO's error, if indeed it was an error, constitutes CUE only if it would have manifestly changed the outcome of the 1972 RO decision. *See Bustos* and *Russell,* both *supra.* Making that determination is "a task for the Board in the first instance". *Russell, supra; see also Mason (Sangernetta), supra* (noting that "question whether this error rose to the level of CUE under § 3.105(a) is a matter to be left to the Board initially"). In addressing the veteran's CUE claim, the Board stated:

> [Although] the June 1952 VA examiner indicated that anxiety was a component of the veteran's duodenal ulcer, ***the doctor specifically reported that a dual diagnosis was not warranted.*** . . . Further support for the 1952 RO decision can be found in the fact that the veteran's separation examination was entirely negative for any findings suggestive of a psychiatric disorder. A June 1948 VA examination was also negative for any pertinent abnormal findings. At the time of the [RO] decision in June 1952, the record reflected treatment in service for anxiety-type psychoneurosis, with no psychiatric disorder

> at service separation, no psychiatric disorder upon a VA examination in 1948, and a medical statement upon examination in June 1952 that the veteran's diagnosis of duodenal ulcer included a psychic or emotional competent [sic] which 'may be a visceral expression of long continued anxiety.' Based on this evidence, the preponderance of which ***showed no post-service diagnosis of a separate or distinct psychiatric disorder***, the RO found that there was no competent evidence of a current psychiatric ***disability***.

R. at 8-9 (emphasis added). Thus, the Board determined that even if the June 1952 examination report had shown evidence of psychiatric symptomatology, the report did not necessarily support a finding of a ***diagnosable psychiatric condition*** or of a psychiatric condition that constituted a ***disability***. Hence, the Board has concluded that even considering that the June 1952 examination report indicated that the veteran's ulcer had had a psychiatric component, the preponderance of the evidence before the RO in June 1952 was against an award of service connection. In view of the foregoing, the Court concludes that the Board has determined that the error asserted by the appellant as to the RO's apparent denial of the existence of evidence in support of his claim would not "have manifestly changed the outcome" of the July 1972 RO decision, and will affirm the BVA decision because it has a reasonable basis in the record and is thus not arbitrary or capricious. *See Marlow v. Brown,* 5 Vet.App. 146, 151 (1993) (" 'The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational

connection between the facts found and the choice made.'" (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983))); *Bustos* and *Russell,* both *supra.*

The Secretary argues that the above addressed claim of CUE was not raised below and that the Court cannot thus address it in the first instance. Sept.1999 Motion at 7; *see Russell,* 3 Vet.App. at 314-15. However, the Court notes that in his Substantive Appeal to the Board, the veteran specifically stated that the RO had denied his claim "despite th[e] diagnosis" reflected in the June 1952 examination report. R. at 181. Hence, the Court disagrees with the Secretary that the claim was not raised below. In any event, the Court will affirm the BVA's denial of the appellant's CUE claims.

B. Finality of April 1952 RO Decision

The appellant's other contention, based on *Hayre, supra,* is that "the [June] 1952 [RO] decision is not final because at that time the VA examination was inadequate." Reply at 7. Thus, he argues that he should have been granted an earlier effective date as to his service-connected ulcer and anxiety disorder. *See* 38 U.S.C. § 5110(a) ("the effective date of an award based on an original claim . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor"); 38 C.F.R. § 3.400(b)(2) (1999) (providing that effective date shall be date of receipt of claim or date entitlement arose, whichever is later, unless claim received within one year after separation from service); *Tucker v. West,* 11 Vet.App. 369, 372 (1998) (concerning effective date of original claim for

service connection). Recently, in *Simmons v. West,* the Court addressed whether the fact that VA did not obtain an adequate examination could constitute a claim of CUE. *Simmons,* ___ Vet.App. at ____, No. 98-354, slip op. at 6-10 (May 15, 2000). The Court held:

> Given the rather murky state of the law and VA regulations prior to the enactment of the Veterans' Judicial Review Act (VJRA), Pub.L. No. 100-687, Div. A, 102 Stat. 4105-4122 (1988) (found at 38 U.S.C. § 7251 note), insofar as the circumstances under which VA had a duty to assist and what that duty comprised, in order for an appellant to prevail on a contention that a pre-VJRA claim remained open under the *Hayre* approach, ***the appellant must first establish that a breach of an extant and applicable duty to assist occurred in connection with the adjudication of that pre-VJRA claim.***

Id. at __, slip op. at 8 (emphasis added). The appellant has not made such a showing in this case. Moreover, the error alleged in this case, i.e., the failure to provide an adequate examination, is virtually the same error as the one that the Court addressed in *Simmons,* where VA had not provided the veteran with an examination that considered potentially applicable regulations. *Id.* at __, slip op. at 6. As to such an asserted error, the Court held that even assuming that the appellant there had "establish[ed] that a breach of an extant and applicable duty to assist occurred in connection with the adjudication of" his claim, "*Hayre* does not require that a breach of the duty to assist such as is alleged in this case . . . be considered such a grave procedural error as to have tolled the finality of the April 1977 RO decision", *id.* at 7-8, and specifically distinguished the circumstances in *Simmons,* which are

esstentially the same as here, from those in *Hayre,* where the issue involved "a failure to give adequate ***notice*** as to circumstances regarding ***missing SMRs*** that the appellant ***specifically requested*** VA to obtain; rather, the appellant asserts that the RO had had a duty in this case, on its own initiative, to provide for a VA medical examination". *Id.* at 7. Hence, the appellant's argument that the June 1952 RO decision has not become final is unavailing.

III. Conclusion

Upon consideration of the foregoing analysis, the ROA, and the parties' pleadings, the Court holds that the Board's determination that the June 1952 RO decision did not contain CUE is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 38 U.S.C. § 7261(a)(3)(A) and 38 U.S.C. § 5109A and 38 C.F.R. § 3.105(a), and that the appellant has not demonstrated that the BVA committed error – in its findings of fact, conclusions of law, compliance with procedural requirements, or articulation of reasons or bases – that would warrant reversal or remand under 38 U.S.C. §§ 1110, 5107, 7104(a) or (d)(1), or 7261, or *Hayre, supra.*

Therefore, the Court affirms the June 26, 1998, BVA decision.

AFFIRMED.

DATED: JUN – 1 2000

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